

ALFRED G. HOYL

IBLA 93-372

Decided October 7, 1993

Appeal from decision of the Colorado State Office, Bureau of Land Management, terminating Federal coal leases C-0127832 through C-0127834.

Affirmed.

1. Coal Leases and Permits: Termination

Federal coal leases are properly terminated for failure to produce coal in commercial quantities at the end of 10 years. Where the coal lessee has been unsuccessful in his attempts to obtain a suspension of the term of the lease, this deadline cannot be extended.

APPEARANCES: James F. Engelking, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Alfred G. Hoyl has appealed from the April 5, 1993, decision of the Colorado State Office, Bureau of Land Management (BLM), terminating Federal coal leases C-0127832 through C-0127834.

The status of these leases was disputed before the Board previously when Hoyl appealed BLM's denial of a request by him and Donald E. Wilde for suspension of the leases. On June 3, 1992, we affirmed BLM's decision. Alfred G. Hoyl, 123 IBLA 169, 99 I.D. 87 (1992) (Hoyl I). On the same day, we issued an order affirming decisions of the Minerals Management Service (MMS) directing Hoyl and Wilde, as lessees of record, to pay past-due rental on the leases, which was held to be due because the leases had not been suspended as requested. Alfred G. Hoyl, IBLA 91-392 and 92-410 (Order Affirming MMS Decisions, June 3, 1992). On February 9, 1993, we reaffirmed Hoyl I and the MMS order on reconsideration. Alfred G. Hoyl (On Reconsideration), 123 IBLA 194A, 100 I.D. 33 (1993) (Hoyl II).

Although the factual background has already been detailed at length in those decisions, a summary of events follows. On June 29, 1981, BLM issued three preference right coal leases to the Dorchester Coal Company (Dorchester), the successor in interest to preference right lease applications originally held by Hoyl and his partners. The leases were issued effective July 1, 1981. In December 1983, following exploratory drilling, Dorchester initiated the mine permit review process before the State of

Colorado. ^{1/} During 1984, the Office of Surface Mining Reclamation and Enforcement (OSM) made several requests for additional information for its review. In July 1985, Dorchester filed its response to OSM, which again returned the application for further information. The application was not pursued by Dorchester, owing to a lack of market for the coal.

In February 1986, Dorchester's interests in the lease were acquired by American Shield, Inc. (American Shield), which also did not proceed with the permit applications. On June 30, 1988, American Shield formally withdrew the applications, citing adverse economic conditions.

On April 18, 1988, BLM formally notified American Shield that it was not in compliance with bonding requirements, as it had failed to file performance bonds in its name. BLM later granted American Shield two extensions of time to comply, but it did not. On December 22, 1988, BLM issued an order finding American Shield in default of lease terms and asking it to show cause why the leases should not be cancelled.

American Shield did not bring the leases into good standing, but instead, on January 9, 1989, filed a request for approval of assignment of leases to Hoyl and Wilde. Acceptable assignment papers were not filed until April 3, 1989, at which time BLM commenced its review of the assignment.

On April 6, 1989, Hoyl and Wilde filed an application seeking a 5-year suspension of the leases, requesting the "suspension of rentals, minimum production, continued operation production requirements, commercial quantities production, forty year mine-out requirement, and due diligence requirement." BLM withheld action on that request because Hoyl and Wilde were not lessees of record.

BLM's consideration of the request for approval of the assignment to Hoyl and Wilde involved seeking approval of the U.S. Department of Justice Antitrust Division and resolution of the question whether the Estate of Gerald T. Tresner (one of the original holders of the preference right lease application interests) retained any interest in the leases. See 43 CFR 3472.2-1 and 3472.2-4. On September 13, 1989, having resolved those questions, BLM informed Hoyl and Wilde that the assignment to them from American Shield could not be approved until they filed adequate lease bonds. In October and December BLM granted them additional time to comply. On December 20, 1989, Hoyl filed acceptable bonds. On January 11, 1990, BLM approved the assignments from American Shield to Hoyl and Wilde. ^{2/}

^{1/} Dorchester sought three separate permits to mine the individual leases, rather than developing the leases as a single unit, as Hoyl and the other holders of the prospecting permit had proposed.

^{2/} The record also refers to a pending assignment from Wilde to Hoyl. It is not clear whether that assignment was approved. We shall presume that it was not.

BLM then extensively considered and, on August 21, 1990, rejected the request of Hoyl and Wilde for suspension of the lease term. BLM concluded that the lease term could not be suspended either under the "force majeure" provisions of section 7(b) of the Mineral Leasing Act (MLA) (as amended by section 6 of the Federal Coal Lease Amendments Act (FCLAA)), 30 U.S.C. § 207(b) (1988), or under the "in the interest of conservation" provisions of section 39 of MLA (as amended by section 14 of FCLAA), 30 U.S.C. § 209 (1988). Hoyl appealed to this Board.

During the pendency of Hoyl's appeal, on April 3, 1990, the Royalty Management Program (RMP), MMS, issued a bill for collection to Hoyl and Wilde under 30 CFR 218.202(a) for past-due rentals for the three Federal leases at issue, evidently for the lease year ending on July 1, 1989. Hoyl appealed that bill to the Director, MMS (MMS-90-0328-MIN). On April 25, 1991, the Director affirmed the RMP's bill, ruling that the question of whether rental was due was controlled by BLM's denial of the request for suspension of operations and production, and that the lease rentals in question continued to be due as a matter of law. Hoyl in turn appealed the Director's decision to this Board. 3/

On December 5, 1990, MMS sent Hoyl and Wilde a second bill for collection seeking additional past due rentals, evidently for the lease year ending on July 1, 1990. Hoyl also appealed that bill to the Director, MMS, (MMS-91-0162-MIN), on whose behalf a decision affirming the RMP was issued on February 14, 1992, and then to this Board. 4/

In our decision in Hoyl I, we first observed that there had been no production from any of the three leases here, and that it appeared certain that minimum production requirements could not be met prior to the 10-year diligent development deadline imposed by sections 207(a) and (b) of MLA if no extension were granted. 5/ Thus, we noted, the continuing validity of the leases turned on whether the lessees were entitled to a suspension of the term of the lease. Hoyl I, 123 IBLA at 183-84, 99 I.D. at 94-95.

In our decisions, we addressed at length the applicability of the two statutory provisions allowing suspensions. We concluded that the mine fire was not a basis for relief under section 7(b) of MLA, and that, in any event, the relief provided by that section would not provide lessees an extension of the diligent development deadline. Hoyl II, 123 IBLA at 194T, 100 I.D. at 44; Hoyl I, 123 IBLA at 184-88, 99 I.D. at 95-97. While noting that a suspension under section 39 of the MLA would have extended the diligent development deadline, we concluded that the circumstances did not justify the granting of such in this case. Hoyl II, 123 IBLA at 194B-194T, 100 I.D. at 35-44; Hoyl I, 123 IBLA at 189-193, 99 I.D. at 98-100. Accordingly, we affirmed BLM's decision denying the request for suspension and MMS' orders to pay rental. The matter was returned to BLM and MMS.

3/ That appeal was docketed as Alfred G. Hoyl, IBLA 91-392.

4/ That appeal was docketed as Alfred G. Hoyl, IBLA 92-410.

5/ The legal basis for the diligent development deadline is set out in detail below.

On April 5, 1993, BLM issued the decision on appeal here, terminating the leases for failure to meet the diligent development requirement:

Federal coal leases C-0127832, C-0127833, and C-0127824 were issued effective July 1, 1981. These leases were issued subject to the provisions of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), as amended. Section 6 of that act subjected [F]ederal coal leases to the conditions of diligent development and continued operation. In addition, section 6 of FCLAA provided that "[a]ny lease which is not producing in commercial quantities at the end of ten years shall be terminated." 30 U.S.C. 207 (1988).

On July 9, 1991, we notified you that, subject to the decision of the Board on your appeal, we intended to terminate these leases effective July 1, 1991. Accordingly, federal coal leases C-0127832, C-0127833, and C-0127834 are hereby terminated effective July 1, 1991, for failure to produce coal in commercial quantities at the end of ten years following the effective date of the leases. 30 U.S.C. 207(a); 43 CFR 3452.3(a). [Emphasis omitted.]

(Decision at 1). BLM also observed that when a lease is terminated for any reason, rentals and other payments are immediately due, citing 43 CFR 3452.3(b). BLM notified the lessees that MMS would review lease accounts to ensure that all monies due were paid before release of lease bonds.

Hoyl appealed BLM's termination decision. By order of June 17, 1993, we granted his request for a stay of the termination decision pending administrative appeal. In view of the fact that Hoyl is seeking judicial review of our decisions in Hoyl I and Hoyl II, we also granted expedited consideration to the present appeal in order to allow the reviewing Court to consider together all aspects of decision to terminate the leases. 6/

[1] Section 7(a) of MLA (as amended by section 6 of FCLAA), provides in part:

(a) Term of lease, annual rentals; royalties; readjustment of conditions

A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. [Emphasis supplied.]

6/ Hoyl states that his appeal is pending before the United States District Court for the District of Colorado as "Civil Action No. 93-C-988."

30 U.S.C. § 207(a) (1988). The leases here were issued effective July 1, 1981, after the passage of FCLAA. Thus, the deadline for lessees to establish production in commercial quantities from the leases was July 1, 1991.

The production requirement (which we refer to as the "diligent development requirement") is clarified by 30 U.S.C. § 207(b) (1988), and implementing Departmental regulations. Under that statute, a lessee must achieve "diligent development" by the end of the "diligent development period." "Diligent development" is defined at 43 CFR 3480.0-5(a)(12) to mean "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." "Commercial quantities" is in turn defined as 1 percent of recoverable coal reserves. 43 CFR 3480.0-5(a)(6). The term "recoverable coal reserves" is defined as "the minable reserve base excluding all coal that will be left, such as pillars, fenders, and property barriers." 43 CFR 3480.0-5(a)(32).

For the leases at issue, the "diligent development period" is the 10-year period commencing July 1, 1981, the effective date of the most recent Federal lease issuance. 43 CFR 3480.0-5(a)(13)(B). Thus, in order to avoid termination, at least 1 percent of the minable reserves of each lease had to have been mined by July 1, 1991.

Hoyl does not assert that diligent development was achieved by the end of the diligent development period as required by law. Indeed, apart from limited production of coal on fee lands prior to the issuance of these leases (which is not cognizable, as it is not "production of recoverable coal reserves" from the leases), the record shows that there has been no production from these leases. Apart from samples, no coal has ever been removed from any of the three Federal leases at issue here. Where diligent development has not been achieved, a decision by BLM declaring the lease terminated is properly affirmed. Utah Power & Light, 117 IBLA 271, 272 (1991).

Hoyl suggests that the leases in question are not covered by FCLAA, as the discovery of coal and the submission of the applications for preference right leases predated its enactment in 1976 (Statement of Reasons at 2). The terms of the Federal leases expressly state, to the contrary, that they are issued "pursuant and subject to the terms and provisions of * * * the Federal Coal Leasing Amendments Act of 1976." No appeal was made in 1981 when those terms were imposed. Further, Hoyl has shown nothing suggesting that the terms of FCLAA were not applicable to all leases issued after its enactment.

Hoyl points out that he and others expended considerable time and money in attempting to develop these leases. ^{7/} We stated in Hoyl I:

^{7/} Hoyl mentions for the first time here an expenditure of \$2 million by Sumitomo Corp. to fund a comprehensive drilling program confirming the coal reserve (Statement of Reasons at 3). It is not clear whether that expenditure occurred before or after lease issuance. It is possible that these funds were used by Dorchester for its exploration activities in 1982.

We are not unmindful that a substantial investment of funds in the three Federal leases was made. However, we do not regard that fact as creating any cognizable equitable or legal right to retain the leases indefinitely, especially in view of Congress' evident policy of requiring development by directing that leases that are not actually developed be terminated. See Mountain States Resources Corp., 92 IBLA at 189-90, 93 I.D. at 242-43.

Hoyl I, 123 IBLA at 193, 99 I.D. at 100. We reaffirm that holding.

Accordingly, BLM properly declared Federal coal leases C-0127832 through C-0127834 terminated, effective July 1, 1991, for failure to produce coal in commercial quantities at the end of 10 years following the effective date of the leases. See 30 U.S.C. § 207(a) (1988); 43 CFR 3452.3(a).

Hoyl also argues that BLM should be estopped from terminating these leases, because he took action to reacquire the lease interests and to bring them into good standing in reliance on an alleged representation by BLM that his application for suspension of the lease term would be granted. Hoyl states, as he did in Hoyl II, that a BLM representative advised him in 1989 "that the force majeure fire would justify a suspension, and that Section 39 of the Mineral Leasing Act could also be invoked," and that "BLM could see no reason why the suspension would not be granted" (Statement of Reasons at 4). Hoyl now asserts that, relying on BLM's representation that the suspension would be granted and his belief that he would, as a result, have 27 months to meet the due diligence deadline and save the lease, he reacquired the lease interests from American Shield, applied for transfer of record title to him and Wilde, paid back rental, posted bonds, and took steps to develop the coal, including signing a memorandum with the China National Local Coal Mining Project for joint development of the three leases as a single unit. Id. 8/ BLM expressly denied Hoyl's allegations, stating in August 1990 that, in discussions with its Chief, Branch of Mining Law and

8/ It is true, as Hoyl suggests (Statement of Reasons at 4, 8), that, if the request for suspension could have been approved effective immediately upon its filing on Apr. 6, 1989, he and Wilde could have completed pre-production activities and still had 27 months after the initiation of production on the leases to meet the due diligence deadline. However, we have never considered whether such suspension could properly date back to a time when the requester was not lessee of record, as our ruling that BLM properly denied the suspension request mooted that question. Even assuming arguendo that Hoyl and Wilde were given a 27-month extension, it is unlikely that the requisite 1 percent of the recoverable reserves of even a single lease could have been mined in that time, in view of the large amount of coal known to be in place on the leases. Hoyl I, 123 IBLA at 193, 99 I.D. at 99.

We nevertheless addressed whether the suspension should have been granted in Hoyl I and Hoyl II because Hoyl and Wilde, as lessees, arguably had a right to mine for the remaining term of the lease, even if the diligent development requirements were not ultimately met.

Solid Minerals, prior to the submission of the application for suspension, Hoyl was informed that an application for majeure suspension had the best chance for approval (compared to a section 39 suspension), not that the suspension was approved.

In Hoyl II, we considered and rejected Hoyl's similar argument that BLM was estopped from denying his application for suspension of the leases. Hoyl II, 123 IBLA at 194T-194X, 100 I.D. at 44-46. We concluded that it showed, at most, that BLM officials had expressed optimism that the suspension could be granted, but contained nothing showing that BLM made a crucial misstatement in an official decision. Therefore, we held, BLM's statement did not provide a basis for estopping BLM from denying the application for suspension.

We now hold that BLM's statement likewise does not provide a basis for estopping it from terminating the leases. BLM's initial optimism turned out to be unfounded, after review of the governing law and regulations in light of Departmental and judicial interpretation of that law. As our decisions in Hoyl I and Hoyl II reveal, the official policy of the Department of the Interior in 1989, as set out in Board decisions, Solicitor's Opinions, and Preamble to the 1988 Rulemaking actions, was to grant suspensions under section 39 in cases where no production had commenced, except in extraordinary circumstances like those here. BLM did not abandon or change a well-established rule when it rejected Hoyl's application for suspension. BLM had no right to accept BLM's early statements as a binding commitment to grant the suspension. Hoyl II, 123 IBLA at 100 I.D. at 45.

To the extent that Hoyl took action in reliance on BLM's initial expression of optimism as to the chances of getting a suspension, he did so at his own risk. Under governing law, the leases in question terminated for failure to meet production requirements. Expression of an optimistic interim opinion by BLM employees that termination might be forestalled, later formally rejected in a formal decision, does not prevent the application of that law. See 43 CFR 1810.3(c).

Hoyl laments our failure to grant his request for hearing, filed as part of his previous petition for reconsideration, and that "it has never been determined whether Hoyl had been misadvised or misled by BLM" (Statement of Reasons at 1). Contrary to his claim, in Hoyl II we did consider the evidence of misadvice submitted by Hoyl and found it inadequate to support his conclusion that BLM had engaged in "affirmative misconduct." The burden of proof lay with Hoyl, who failed to present adequate evidence or offer of proof either to justify a different conclusion or to raise adequate doubt that a hearing should be ordered. Hoyl has presented no further evidence or offer of proof in the present appeal that would lead us to order a hearing.

Citing Mathews v. Eldridge, 424 U.S. 319 (1976), Hoyl asserts that he has been denied due process. Departmental regulations do not guarantee every recipient of an adverse BLM decision a right to a hearing. Instead, hearings are required only when a question of fact is presented that cannot be resolved by the BLM.

be resolved on the basis of a written case record, as supplemented by documents or affidavits submitted on appeal. 4.415; see Lazy VD Ranch, 108 IBLA 224, 228 (1989). Hoyl disregards the Supreme Court's caution in Mathews

The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that a "person in jeopardy of loss [be given] notice of the case against him and the opportunity to meet it." * * * All that is necessary is that procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," * * * to insure that they are given a meaningful opportunity to present their case. [Citations omitted.]

Mathews v. Eldridge, 424 U.S. at 348-49. Hoyl's due process rights are protected by his right to seek review before the Board, which has the authority and capacity to review and decide questions of law and fact independently and objectively, and which has extensively reviewed his objections to BLM's decisions. 9/

Hoyl asks us to find that MMS may not require him to pay rent on these leases, which (he submits) he has not been permitted to use. To the extent that Hoyl seeks reconsideration of our earlier order affirming MMS' decisions requiring him, as lessees of record, to pay rental on the leases, his request is denied as untimely. The validity of MMS' demand for rental has been fully and finally adjudicated. We previously held that BLM had properly denied Hoyl's and Wilde's request that their obligation to pay rental be suspended, because they did not present detailed supporting information as required by 43 CFR 3485.2(c)(1). Hoyl I, 123 IBLA at 194, 99 I.D. at 100. We perceive no reason to alter that holding.

To the extent that Hoyl requests us to bar MMS from making further demands for rental, that request is denied as premature. MMS demands are subject to review according to established procedures. 30 CFR Part 290. The jurisdiction of the Board is properly invoked only when such decision is issued and appealed through the Director, MMS. Hoyl's argument that he does not owe rental because BLM has denied him use of the lease may properly be raised in that context. 10/

9/ Hoyl states that he was deprived of access to the administrative record because it was transferred to the Board. He claims that he was free to review the record in our offices, or to request temporary transfer of the original file to the Colorado State Office. 10/ We would note however that the coal leases were never suspended, and rental therefore continued to accrue. Hoyl I, 123 IBLA at 194, 99 I.D. at 100.

Further, we find little support in the record for Hoyl's assertion that he "has not been permitted to use" the leased lands. Hoyl and his predecessors in interest have had free access to develop the lands under lease in

Hoyl argues that terminating the leases now would threaten his pending judicial review of our decisions approving requests for suspension in Hoyl I and Hoyl II, depriving him of a remedy and creating the possibility that his suit for review of those decisions will be made moot. Hoyl does not indicate that he has requested a judicial stay of the Department's authority to adjudicate or to collect rental on these leases pending review by the Court of the suspension decisions, and is not aware that the Court has issued such stay. In the absence of such, we remain free to consider whether BLM properly declared the lease terminated.

Hoyl also argues that he could not "make beneficial use of the leases pending" BLM's decision on the request for suspension "because to do so would have deprived him of preserving the April 1, 1989, effective date had the suspensions been granted" (Statement of Reasons at 8). ^{11/} He condemns the fact that he is placed in this "Catch-22" situation. It is true that the relief provided by section 39 is quite limited and does not actually toll the running of the lease term. We are not free to extend relief. Hoyl reacquired the leases with full knowledge that the diligent development deadline was fast approaching. He reasonably have anticipated that there would be substantial delays before coal could be mined: there was no open entry; there was no approved R2P2 or even a pending application for same; a market for any coal that might be produced had to be developed. Hoyl also plainly faced the risk that if his suspension were denied, he would lose the rental and any other monies spent in attempting to achieve development. Hoyl cannot properly be blamed because Hoyl's gamble did not pay off. ^{12/}

It should also be remembered that the lack of adequate time to meet the due diligence requirement in 1989 was the result of the failure of their predecessors in interest to develop the leases. That, more than any delay by BLM, doomed Hoyl's last-minute effort to save the leases from termination.

fn. 10 (continued)

accordance with governing regulatory restrictions requiring approval of a resource recovery and protection plan (R2P2). As we held in Hoyl II, the failure to develop these leases resulted not from Governmental action, but from the affirmative decision of previous lessees of record not to proceed. See Hoyl II, 123 IBLA at 194M, 100 I.D. at 40.

Hoyl may be referring to the fact that BLM denied R2P2 applications filed by Hoyl and Wilde in January and March 1989. Those decisions were accepted without appeal. Hoyl II, 123 IBLA at 194S, n.17, 100 I.D. at 43, n.17. By failing to appeal that decision, Hoyl waived his right to assert that BLM's decision improperly denied him access to the leases.

^{11/} As discussed above at n.10, we do not find that the suspension, if granted, would have been effective on April 1, 1989.

^{12/} Hoyl's losses are presumably mitigated by consideration he received when the preference right lease applications were sold to Dorchester. Further, Hoyl is not in a unique position: all Federal mineral lessees run the risk that if they fail to develop, their development monies will be lost.

if a lease terminates for failure to meet lease terms.

To the extent not expressly addressed, Hoyl's other arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge